Muhibbah Teguh Sdn Bhd v Yaacob bin Mat Yim (t/a Tetuan Yacob Mat Yim & Rakan-Rakan)

HIGH COURT (KUALA LUMPUR) — SUIT NO D1–22–2912 OF 1998
VINCENT NG J
1 MARCH 2005

Moneylenders — Loan of money — Interest free — Charge of interest on late payment of loan — Whether constitute moneylending transaction — Moneylenders Act 1951 ss 2 & 2A(1)(h)

Moneylenders — Moneylending transaction — Interest free loan — Charge of interest on late payment of loan — Whether constitute moneylending transaction — Moneylenders Act 1951 ss 2 & 2A(1)(h)

Moneylenders — Unlicensed moneylender — Unenforceable contracts — Whether borrower could be ordered to refund money borrowed — Contracts Act 1950 s 66 — Moneylenders Act 1951 s 15

The defendant had received a loan in the sum of RM150,000 from the plaintiff on 27 January 1998. In consideration of the loan sum of RM150,000 granted by the plaintiff to the defendant, the defendant had expressly agreed in writing with the plaintiff to repay the plaintiff in full, on or before 2 July 1998, the following sums: (1) the said loan sum of RM150,000; (2) the sum of RM33,770.27 as agreed legal fees, costs and incidental charges; and (3) a further sum of RM196,229.73, being the sum agreed by the defendant to be then outstanding by one Jamal bin Hussain. It was further agreed that the loan was interest free but a 10% per annum interest was chargeable in respect of late payment charges, ie after the due repayment date of 2 July 1998. The issues were: (1) whether the plaintiff had lent money (on one or two occasions) to the defendant in consideration of a larger sum being paid; and (2) whether he was a moneylender at the time of the impugned transaction or transactions.

Held, allowing the plaintiff's claim:

(1) Considering the express provisions in s 2A(1)(h) of the Moneylenders Act 1951 ('the Act') read in conjunction with the definition of 'moneylender' in s 2, there must proof that the lender was 'carrying on the business of moneylending', that entails 'some degree of system and continuity in his moneylending transactions'. Thus, if the lender adduces *prima facie* evidence that, at the material time of the transaction he was not a moneylender, the borrower clearly had two essential factual requirements to hurdle in his cause, namely: (1) the loan was a moneylending transaction; and (2) the lender was carrying the business of moneylender (see para 21).

(2) The plaintiff had not charged interest on the loan of RM150,000 and the 10% per annum interest was only in respect of default or late

payment interest. Whereas a loan bearing interest would constitute a moneylending transaction, the charging of only late payment interest on a loan ought not to constitute a moneylending transaction within the purview of s 3. Obviously, no lender could carry on a feasible or viable business of moneylending if he only charges late payment interest (see para 24).

(3) The plaintiff had sufficiently rebutted the presumption that they were 'moneylenders' (see para 25). No evidence was adduced in court to show that the plaintiff profited from the repayment of a larger sum. Indeed, the defendant had agreed in P1 that the sum of RM33,770.27 was legal fees, costs and incidental charges, and further agreed that the sum of RM196,229.73 was the actual sum outstanding by Jamal to the plaintiff (see para 26). In any event, since it was only contended by the defendant that the moneylending transaction was void rather than illegal, s 66 of the Contracts Act 1950 required the defendant to refund the sum received. The reason being that s 15 of the Act does not negate s 66 of the Contracts Act (see para 31).

[**Bahasa Malaysia summary**

Defendan telah menerima pinjaman berjumlah RM150,000 daripada plaintif pada 27 Januari 1998. Sebagai balasan kepada pinjaman RM150,000 yang diberi oleh plaintif kepada defendan, defendan telah setuju secara bertulis dengan plaintif untuk membayar balik plaintif jumlah penuh pada atau sebelum 2 Julai 1998, jumlah-jumlah tersebut: (1) jumlah pinjaman itu sebanyak RM150,000; (2) jumlah RM33,770.27 sebagai yuran guaman, kos dan pembayaran sampingan; dan (3) jumlah tambahan RM196,229.73 iaitu jumlah yang disetujui oleh defendan sebagai jumlah tertunggak oleh Jamal bin Hussain. Ia juga disetujui bahawa pinjaman itu adalah tanpa faedah tetapi sebanyak 10% faedah tahunan dicaj sebagai caj bayaran lambat iaitu selepas tarikh bayar balik 2 Julai 1998. Isu-isu adalah: (1) sama ada plaintif telah meminjam duit (sekali atau dua kali) kepada defendan dengan balasan satu jumlah yang lebih besar dibayar; dan (2) sama ada defendan adalah pemberipinjam wang pada masa transaksi atau transaksi-transaksi itu.

Diputuskan, membenarkan tuntutan plaintif:

(1) Mengambil kira peruntukan dalam s 2A(1)(h) Akta Pemberipinjam Wang 1951 dibaca bersama dengan definisi 'pemberipinjam wang' dalam s 2, mesti ada bukti bahawa pemberipinjam wang menjalankan perniagaan memberipinjam wang yang mempunyai satu sistem dan penerusan dalam transaksi-transaksi pinjaman wang. Oleh itu, sekiranya pemberipinjam memberi keterangan *prima facie* bahawa pada masa matan transaksi itu beliau bukan seorang pemberipinjam wang,

peminjam jelas perlu memenuhi dua keperluan faktual dalam kausanya, iaitu: (1) pinjaman itu adalah satu transaksi pemberipinjaman wang; dan (2) pemberipinjam telah menjalankan perniagaan seorang pemberipinjam wang (lihat perenggan 21).

(2) Plaintif tidak caj faedah ke atas pinjaman RM150,000 dan faedah 10% setahun adalah hanya berhubung kegagalan membayar atau pembayaran lambat. Di mana satu pinjaman yang mengenakan faedah akan berjumlah satu transaksi pemberipinjaman wang, satu caj faedah ke atas pembayaran lambat tidak sepatutnya berjumlah kepada satu transaksi pemberipinjaman wang di bawah lingkungan s 3. Adalah jelas bahawa tiada pemberipinjam boleh menjalankan satu perniagaan pemberipinjaman wang dengan hanya mencajkan faedah untuk pembayaran lambat (lihat perenggan 24).

(3) Plaintiff telah dengan secukupnya membangkang anggapan bahawa mereka merupakan 'pemberipinjam wang' (lihat perenggan 25). Tiada keterangan dikemukakan di mahkamah untuk menunjukkan bahawa plaintif telah untung daripada pembayaran balik satu jumlah yang lebih besar. Adalah betul bahawa defendan telah menyetujui dalam P1 bahawa jumlah RM33,770.27 adalah yuran guaman, kos dan caj-caj tambahan, dan juga bersetuju bahawa jumlah RM196,229.73 adalah jumlah tertunggak oleh Jamal kepada plaintif (lihat perenggan 26). Dalam apa-apa keadaan pun, oleh kerana defendan hanya menyatakan bahawa transaksi-transaksi pemberipinjaman wang itu adalah sekadar terbatal dan bukan tidak sah, s 66 Akta Kontrak 1950 memerlukan defendan memulangkan semua jumlah wang itu. Ini adalah kerana s 15 Akta itu tidak membatalkan s 66 Akta Kontrak (lihat perenggan 31).]

Notes

For cases on loan of money generally, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 502–503.

For cases on moneylending transaction generally, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 522–524.

For cases on unenforceable contracts, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 572–574.

Cases referred to

Aik Ming (M) Sdn Bhd v Chang Ching Chuen [1996] 2 MLJ 770 (refd)
Amman Singh v Vasudevan [1973] 1 MLJ 210 (refd)
Browne v Dunn (1893) 6 R 67 (refd)
Chellapah Rasadurai v Selvadurai [1971] 2 MLJ 170 (refd)
Cheong Kim Hock [1992] 2 SLR 349 (refd)
Cheong Kim Hock v Lin Securities (Pte) (in liquidation) [1992] 2 SLR 349 (refd)
Chow Yoong Hong v Choong Yah Rubber Manufactory [1962] MLJ 74 (refd)

A *Esmail Sahib v Noordin* [1951] MLJ 98 (refd)
Lek Peng Lung [1992] 2 SLR 150 (refd)
Ngui Mui Khin [1980] 1 MLJ 9 (refd)
Rasadurai v Selvadurai [1971] 2 MLJ 170 (refd)
Sandhu Singh v Sellathurai [1955] MLJ 117 (refd)
B *Subramaniam Dhanapakiam* [1991] 2 MLJ 447 (refd)
T Chellaapah v Official Assignee [1971] 1 MLJ 24 (refd)
Yeep Mooi v Chu Chin Chua & Ors [1981] 1 MLJ 14 (refd)

Legislation referred to

C Contracts Act 1950 s 66
Moneylenders Act 1951 ss 2, A(1)(h), 3, 15
Rules of the High Court 1980 O 34 r 4(2)(c)

SM Chan (MY Kong with her) (Tan Chuan Yong & SM Chan) for the plaintiff
Amir Asree Meor Nordin (Wan Khairuddin bin Wan Montil with him) (Zainal Rijal
D *Talha & Amir) for the defendant*

Vincent Ng J:

[1] As I had expected, this case had to go for full trial. And, I would expect
E my decision here would be appealed. The defendant is a lawyer. Furthermore, the plaintiff had s 3 of the Moneylenders Act 1951 to contend with. So, I decided to promptly put pen on paper to write and deliver this decision within a week after the close of trial.

[2] At the commencement of and in the course of the trial the following
F pertinent facts common between the parties were recorded and recognised by this court.

[3] At all material times, the defendant was a sole proprietor trading under the name and style of Yacob Mat Yim & Rakan-Rakan running a legal practice at No 93C, Tingkat 2, Jalan Bangsar, 59200 Kuala Lumpur. The defendant
G had executed an irrevocable and unconditional Letter of Undertaking dated 26 January 1998 in favour of the plaintiff as contained in 'exh P1'. The defendant had received a loan in the sum of RM150,000 from the plaintiff by way of a bearer's cheque no 404389 dated 27 January 1998 which was drawn on Bank Bumiputra Malaysia Bhd, and the defendant had acknowledged
H receipt of the same by signing on the plaintiff's payment voucher no 2512 dated 23 January 1998. In consideration of the loan sum of RM150,000 granted by the plaintiff to the defendant, the defendant had expressly agreed in writing with the plaintiff to repay the plaintiff in full, on or before 2 July 1998, the following sums:

I (a) the said loan sum of RM150,000;

(b) the sum of RM33,770.27 as agreed legal fees, costs and incidental charges; and

(c) a further sum of RM196,229.73, being the sum agreed by the defendant to be then outstanding by one Jamal bin Hussain (NRIC No 5826416).

[4] It was further agreed that: the loan of RM150,000 to him was interest free; that, in respect of the loan of RM150,000, a 10% per annum interest was only chargeable in respect of late payment charges ie after the due repayment date of 2 July 1998; and that a 10% late payment charges for period after 2July 1998 was to be payable on the RM196,229.73 loan to Jamal.

[5] Thus, the RM380,000 claim comprise precisely the aggregate of RM150,000 plus RM33,770.27 and RM196,229.73, and both parties have agreed that no interest was to be charged on the RM380,000 until 2 July 1998.

[6] Through this court's meticulous case management the parties have readily agreed, pursuant to O 34 r 4(2)(c) of the Rules of the High Court 1980, to confine the determination of the case to only two issues, namely:

(a) Whether the plaintiff had lent money (on one or two occasions) to the defendant in consideration of a larger sum being paid.

(b) Whether he was a moneylender at the time of the impugned transaction or transactions.

[7] To support his cause, on this point, counsel for the defendant cited the following passage in *Chellapah Rasadurai v Selvadurai* [1971] 2 MLJ 170 (FC) which reads:

> … In the instant case on the plaintiff's own pleadings alone it is clear that he had two occasions lent money to the defendant in consideration of a larger sum being paid, and therefore the statutory presumption under s 3 arose against him …

[8] He further quoted another passage in *T Chellaapah v Official Assignee* [1971] 1 MLJ 24 (FC) (which were decided pursuant to s 3) which states:

> … Section 3 enables a defendant to found his claim on proof of a single loan made to him at interest, it being presumed, in the absence of rebutting evidence that there were sufficient other transaction of a similar sort to amount to a carrying on business … It will be seen that proof of a single loan made to the debtor at interest raised a presumption that there were sufficient other transaction of a similar sort to amount to a carrying on of the business of money lending by the appellant …

[9] The question is, how do we resolve the above views of the Federal Court in the light of s 2A(1)(h) read with s 2 of the Act as elucidated by the Privy Council in *Chow Yoong Hong v Choong Yah Rubber Manufactory* [1962] MLJ 74 (on system and continuity) and *Esmail Sahib v Noordin* [1951] MLJ 98 (on system) and *Ngui Mui Khin* [1980] 1 MLJ 9 (FC) (the Act does not apply to moneylending transaction but only to moneylenders).

[10] It is axiomatic that one or two moneylending transactions (even in consideration of a larger sum) does not make the lender a moneylender within the purview of the definition of 'moneylender' in s 2 of the Act. It is also axiomatic that the Act is intended to apply to moneylenders exclusively and not to moneylending transaction or transactions per se. This statement of law was again affirmed by Federal Court in *Yeep Mooi v Chu Chin Chua & Ors* [1981] 1 MLJ 14 which I shall discuss later in this judgment. (See also *Cheong Kim Hock* [1992] 2 SLR 349, *Lek Peng Lung* [1992] 2 SLR 150 and *Subramaniam Dhanapakiam* [1991] 2 MLJ 447.)

[11] In *Chow Yoong Hong* the Privy Council had this to say:

> … The Court of Appeal likewise dealt only with this question; and in dealing with it concerned themselves very closely with the true meaning and effect of s 3 of the Ordinance. This section is not in their Lordships' opinion in the circumstances of this case of great significance, but in view of the different approach by the judges in the Federation of Malaysia, they think it desirable to make some comment on it.

[12] Section 3 provides that 'any person who lends a sum of money in consideration of a larger sum repaid shall be presumed until the contrary be proved to be a moneylender'. The effect of this section has been considered by Thomson J (as he then was) in *Sandhu Singh v Sellathurai* [1955] MLJ 117 in a judgment which their Lordships respectfully approve and adopt. *To lend money is not the same thing as to carry on the business of moneylending. In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions.* If he were left to discharge this burden without the aid of any presumption, a defendant might frequently be in a difficulty. He might have had only one or two transactions with the moneylender and he might find it difficult to obtain evidence about the business done by the moneylender with other parties. Section 3 enables a defendant to found his claim on proof of a single loan made to him at interest, it being presumed, in the absence of rebutting evidence, that there were sufficient other transactions of a similar sort *to amount to carrying on of business'*.

[13] In *Esmail Sahib* Spencer Wilkinson J held that:

> The plaintiff's claim was in respect of two items of money lent to the defendant — $5,000 on 15 September 1948 and $900 on 30 October 1949 with interest thereon. The loans were not disputed and it was common ground that the only point which called for decision was whether or not the plaintiff was a 'moneylender' within the meaning of the definition contained in s 2 of the Moneylenders Ordinance.

[14] The definition of 'moneylender' contained in our Ordinance is the same as that contained in the English Act of 1900 and it has been held in the courts of England that under this definition it is a question of fact in each case whether or not the transactions carried out by the lender are such as to bring him *within the meaning of the words 'carrying on the business of moneylending'. It is not*

sufficient to prove that the lender has occasionally lent money at a remunerative rate of interest; some degree of system and continuity in moneylending transactions must be proved.

[15] There is however one important difference between the English law on this subject and the local law. Section 3 of the Moneylenders Ordinance reads as follows:

> 3 Save as excepted in paras (a), (b), (c) and (f) of the definition of 'Moneylender' in s 2, any person who lends money at interest or who lends a sum of money in consideration of a larger sum being repaid shall be presumed, until the contrary is proved, to be a moneylender.

[16] Counsel were unable to cite any local authority which could assist me in determining the effect of this section and I have been in some doubt as to the extent of the burden of proof cast by this section upon a plaintiff who has in fact lent money at interest. It is difficult to see how else a plaintiff can discharge this burden by himself giving evidence to the effect that he is not a moneylender and by submitting to cross-examination on the point.

[17] And in *Ngui Mui Khin* the Federal Court had this to say about the Act:

> At the outset we wish to observe that the Moneylenders Ordinance 1951 *does not apply to moneylending but only to moneylenders*. It does not make every moneylending transaction illegal and unenforceable. It is only a moneylending transaction of a moneylender which is the subject matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceable by the court.
>
> He is a moneylender if within the meaning of s 2 of the Ordinance he can be said to be a person 'whose business is that of moneylending'. *To prove business requires some sort of continuity or system or repetition of similar transaction.* (*Chow Yoong Hong v Choong Fah Rubber Manufactory*) If business of moneylending cannot be proved by factual evidence so as to make a person a moneylender, presumption under s 3 can be prayed in aid. Here if it is proved that 'a person lends a sum of money in consideration of a larger sum being repaid' such person is presumed to be a moneylender unless the contrary is proved. However ss 2 and 3 of the Ordinance exclude a number of persons, organisations and societies from the scope of the definition and presumption of a moneylender. These two sections, therefore, do not regard their businesses as those of moneylending, though the transactions of which they are parties involved the lending of money. One such person specially excluded from being a moneylender is mentioned in para (c) of s 2 of the Ordinance. He is 'any person … *bona fide* carrying on any business not having for its primary object the lending of money in the course of which and the purposes whereof he lends money'. The English Moneylenders Act 1900 contains a similar exclusion clause, which has been the subject of many judicial decisions. The principle established by all these decisions, we respectfully agree, is that *the question whether a person is a moneylender or not is one of fact and that our task is to see whether the primary or principal object of his business as distinguished from incidental parts of his business is one of moneylending.*

[18] The above ratio was affirmed again by the Federal Court in the case of *Yeep Mooi* in the following lucid language:

> We have on another occasion observed that the Moneylenders Ordinance 1951 does *not strike at moneylending but at moneylenders* and at the loans lent by them. The Ordinance is never intended to apply to an individual, or any member of the public *who lends money even at interest, unless he does so as a business* (*Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9). We agree with the courts below that the fact that the appellant by depositing a sum of $5,000 at 14.4% per annum with the deceased raises a presumption under s 3 of the Ordinance that she was a moneylender …
>
> However, the presumption is not irrebuttable. It can be rebutted, *inter alia*, by the fact that the appellant did not deposit her money with the pawnshop as a business of moneylending — ie she did not carry on the business of moneylending. Section 2 of the Ordinance defines a moneylender, subject to a number of exceptions, to include:
>
> > every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business …
>
> Thus the crux of the matter is the lending of money by a person, whose business is moneylending. This is purely a question of fact.
>
> … *Repetition of similar deposits per se does not necessarily constitute a business, still less the business of moneylending.* In our view, the placing of the sum in question on deposit by the appellant despite the previous two other deposits does not amount to a carrying on a business at all. Even assuming that it does so amount, the business so carried on is certainly not the business of moneylending.

[19] It is my view that it is unfortunate that s 3 is couched in equivocal language. This has caused perennial difficulties in the courts and has enabled some borrowers to invoke this provision to their advantage. The duty of a judge is to advance equitable and tenable law through the process of rational ratiocination rather than to advocate or lean to a certain position between the contending sides without cogent ratonale. Surely, considering the scheme of the Act and the definition of the word 'moneylender' in s 2 read with s2A(1)(h), s 3 should only be read as a provision designed to facilitate proof of borrower's assertion that the lender was at the material time of the loan carrying on the business of moneylending. Nonetheless, it cannot be said that, upon proof of a single interest bearing moneylending transaction, the lender becomes a 'moneylender' as defined in s 2 of the Act. It is illogical and does not make sense to suggest (as dicta in *Chellapah Rasadurai* seem to suggest) that ss 2 and 3 of the Act are of mutually exclusive application. For if this was the intention of the legislature these two provisions would have been couched as a single provision framed in the alternative. It is a question of fact whether a lender is a 'moneylender' or not and I would readily agree

with Spencer Wilkinson J, in *Esmail Sahib*, that it is difficult to see how else a plaintiff (lender) can discharge the burden other than by himself given evidence to the effect that he is not a moneylender and by submitting to cross-examination on the point. See also *Cheong Kim Hock v Lin Securities (Pte) (in liquidation)* [1992] 2 SLR 349. In that case there was no evidence of system, though the loan was given at 12% interest per annum.

[20] Section 2 of the Act defines 'moneylender' as 'every person whose business is that of moneylending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than lending of money and whether that person carries on the business as a principal or as an agent'. But s 2A(1)(h) exempts 'any person bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money'. Whereas, s 3 states: 'Save as excepted in paras (a), (b), (c) and (f) of the definition of 'moneylender' in s 2, any person who lends money at interest or who lends a sum of money in consideration of a larger sum being repaid shall be presumed, until the contrary is proved, to be a moneylender.'

[21] Thus, in my view, considering the express provisions in s 2A(1)(h) read in conjunction with the definition of 'moneylender' in s 2, the ratio affirmed by the Privy Council and our apex courts, namely, *Ngui Mui Khin* and *Yeep Mui* — which require proof that the lender was 'carrying on the business of moneylending', that entails 'some degree of system and continuity in his moneylending transactions' — accords with the Act and should be adopted. Thus, if the lender adduces prima facie evidence that, at the material time of the transaction he was not a moneylender, the borrower clearly has two essential factual requirements to hurdle in his cause, namely:

(a) the loan was a moneylending transaction (the first hurdle; and

(b) the lender was carrying the business of moneylender (the second hurdle).

[22] So, if a plaintiff company denies that it is a moneylender and prima facie evidence is adduced, such as, that the Articles and Memorandum of Association of the company does not permit the lending of money as a business (as in the instant case), the onus shifts to the borrower to surmount the second hurdle.

[23] After hearing the oral evidence adduced on behalf of both sides, I am entirely satisfied that the defendant has not succeeded in hurdling even the first hurdle. My reasons are as follows:

[24] It is common ground that the plaintiff had not charged interest on the loan of RM150,000 and the 10% per annum interest was only in respect of default or late payment interest. In my view, whereas a loan bearing interest

would constitute a moneylending transaction, I would hold that the charging of only late payment interest on a loan ought not to constitute a moneylending transaction within the purview of s 3 as, obviously, no lender could carry on a feasible or viable business of moneylending if he only charges late payment interest.

[25] Should I be wrong on the first hurdle, the question then to be determined would be a question of fact whether or not the transaction or transactions carried out by the lender are such as to bring it within the meaning of the words 'carrying on the business of moneylending', such as to make him a 'moneylender' against whom the Act was designed to strike at. On this aspect of the factual requirement, I would hold that the plaintiff had sufficiently rebutted the presumption that they were 'moneylenders' upon the following grounds.

[26] The defendant had submitted that the plaintiff profited from the repayment of a larger sum. However, no evidence was adduced in court on this assertion. It was not put to PW1 in cross-examination that the sum of RM33,770.27 agreed in the Letter of Undertaking was not what it had been described to be, nor was it put to PW1 that the sum of RM196,229.73 agreed in the Letter of Undertaking to be owing by Jamal to the plaintiff was not owed by Jamal or that it was wrong or inflated or that the plaintiff profited from it. Indeed, the defendant had agreed in P1 that the sum of RM33,770.27 was legal fees, costs and incidental charges, and further agreed that the sum of RM196,229.73 was the actual sum outstanding by Jamal to the plaintiff.

[27] It was only raised for the first time in the examination in chief of DW1 that PW1 told him (DW1) that the sum of RM33,770.27 was to be the plaintiff's profit. As this matter was not raised or put to PW1 during cross-examination, no inference ought to be drawn therefrom which would have the effect of varying or contradicting what has been written in P1. See *Aik Ming (M) Sdn Bhd v Chang Ching Chuen* [1996] 2 MLJ 770.

[28] However, if it was sought to show that there was a previous moneylending transaction to Jamal bin Hussain, I find that the defendant has also failed on this score. In respect of that loan of RM196,229.73 to Jamal, Jamal himself was not called to give evidence. The defendant himself did not adduce any evidence on whether the loan to Jamal was interest bearing or whether late payment interest charges was imposed on that loan to Jamal. However, in cross-examination of PW–1 (Dato' Sri Mohd Adib bin Mohd Adam), the witness said that: 'I repeat that I do not know how the RM196,229.73 loan was to be utilised for. As to the second part of the question, if given time I can show from our accounts how the differential was arrived at between RM172,896.80 and RM196,229.73'. Defendant's counsel had only put to him that the differential showed a bigger sum to be repaid but he did not put to him that the differential in the two sums was in fact interest charged (late

payment or otherwise) on the loan or that the loan was in consideration for a larger sum to be repaid. In re-examination by plaintiff's counsel, PW1 said: 'in all the loans given to En Jamal there was no interest imposed. The sum of RM196,229.73 comprised the actual loan given to Jamal inclusive of expenses and or costs'. This piece of evidence this court would have to accept, in the circumstances. At the trial, this is about the only evidence elicited on the loan to Jamal and it was unchallenged. I also found nothing in exh P1 to indicate that this document was signed by Defendant as solicitors for and on behalf of Dato' Jamal. Indeed, the sum of RM150,000 stated in exh P1 had nothing to do with Dato' Jamal.

[29] On the requirement that this aspect of the evidence ought to be put to the plaintiff in cross, I need do no more than to set out the illuminating passage from the judgment of Mohd Azmi J (as he then was) in *Amman Singh v Vasudevan* [1973] 1 MLJ 210 who observed that:

> In his defence, the defendant's contention is that the March 1969 Agreement whereby the plaintiff advanced the sum of $10,000 to the company 'free of interest' is basically a moneylending transaction and as such it is illegal because the plaintiff is not a licensed moneylender and he has not complied with the provisions of the Moneylenders Ordinance. The defence contends that the twenty cents per ton of forest produce payable to the defendant is in fact interest on the so-called free of interest loan. Further, since the plaintiff lent the money to the company in consideration of a larger sum being repaid, the presumption under s 3 of the Moneylenders Ordinance 1951 would arise and that the plaintiff has not rebutted the presumption that he is a moneylender. In my view, the legality or otherwise of the March 1969 Agreement between the plaintiff and the company is not the main issue. The plaintiff's cause of action is based on the June 1969 Agreement, and the question which I have to determine is whether the undertaking given by the defendant to pay the plaintiff $10,000 on or before 30 August 1969 is a valid agreement enforceable at the instance of the plaintiff. The March 1969 Agreement is only relevant to the extent that it explains the circumstances which led to the undertaking given by the defendant to the plaintiff on June 18, 1969. Bethat as it may, having considered the March 1969 Agreement and the evidence adduced in this case, I find there is insufficient evidence to prove any degree of system and/or continuity in moneylending transactions so as to bring the plaintiff within the meaning of 'moneylender' under the Moneylenders Ordinance 1951. The plaintiff is a graduate from the University of Malaya and is employed by the Royal Insurance Company Limited in Kuala Lumpur. I accept his testimony that, apart from this loan of $10,000 to the company, he had not entered into any moneylending transaction with anybody else except on one or two occasions where he lent $50 to friends with no interest. In his evidence, the defendant alleged that, as in the case of the plaintiff, other people like Mrs Prem Singh, Mr Sadhu Singh and Mr Sarab Singh had advanced money to the company and had executed similar loan agreements. *I cannot accept this piece of evidence as it was neither put to the plaintiff in cross-examination nor was any of the three persons named called to give evidence.* Inany event, the fact that other people had lent money to the company does not make the plaintiff a moneylender. As regards s 3 of the Ordinance, in view of my

finding that the plaintiff's business is not that of moneylending, and that he has not carried on or advertised or announced himself or held himself out in any way as carrying on the business of moneylending, the statutory presumption that the plaintiff is a moneylender has sufficiently been rebutted.

[30] Similar views were expressed by the Court of Appeal in *Aik Ming (M) Sdn Bhd v Chang Ching Chuen* at p 794:

> … It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded cases and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

See also *Rasadurai v Selvadurai* [1971] 2 MLJ 170 and *Browne v Dunn* [1893] 6 R 67.

[31] In any event, even should the plaintiff fail in both the above hurdles, yet since it is only contended by the defendant that the moneylending transaction(s) is (or are) void rather than illegal, s 66 of the Contracts Act 1950 requires the defendant to refund the sum received, as the provision states 'When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.' Thus, even should the plaintiff be held to be a moneylender and the loan in exh P1 declared void, then in my view, the sum of RM150,000 would still be ordered to be refunded to the plaintiff under s66 of the Contracts Act. The reason being that s 15 of the Moneylenders Act does not negate s 66 of the Contracts Act. Section 15 only states that a loan contract in violation of the Act is 'unenforceable'. This is axiomatic, as a void contract is unenforceable. It must be noted that as such loan contract is a void but not an illegal contract s 66 should be applicable considering that s 66 is a specific provision to cater to an agreement which 'is discovered to be void, or when a contract becomes void'.

[32] For all the above reasons I allow the plaintiff's claim as prayed in encl 1 with costs.

Plaintiff's claim allowed.

Reported by Loo Lai Mee